United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1342

To be argued by RICHARD S. STOLKER

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P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

LEONARD DURSO, RICHARD FABELLA, and
WILLIAM MORTON, Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. §894 prohibits the use of extortionate means to collect an extension of credit arising from the sale of narcotics.

2. Whether the court erred in denying defendants' motion to sever counts.

3. Whether the trial court improperly amended the indictment against defendant Morton.

4. Whether the trial court was required to conduct a pretrial hearing as to the competency of a government witness.

5. Whether the government proved a single narcotics conspiracy as charged in the indictment.

6. Whether the extrajudicial admissions of co-conspirators were properly admitted in evidence.

7. Whether the evidence was sufficient to sustain appellant Fabella's convictions.

8. Whether the extortionate means counts were multiplicitous.

9. Whether the trial court correctly denied appellant Durso's motion for a mistrial grounded upon the unresponsive testimony of a government witness that Durso had "made a sexual advance" toward him.

10 Whether the court properly sentenced appellant Morton.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, appellants were convicted and sentenced as follows:

Durso was convicted on three counts for having used extortionate means to attempt to collect an extension of credit, in violation of 18 U.S.C. §894(a) (counts 2, 3, and 5), for having distributed and possessed with intent to distribute approximately one quarter pound of cocaine, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (count 7), and for having conspired with the codefendants and others[1/] to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §846 (count 9). He was sentenced to 10 years' imprisonment on counts 2, 3, and 5, and 10 years' imprisonment to be followed by a special 5-year parole term on counts 7 and 9, all sentences to run concurrently (Sen. Tr. 13).

Fabella was convicted for having used extortionate means to collect an extension of credit, in violation of 18 U.S.C. §894(a) (count 5), and for having conspired with

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1/ Also named in the conspiracy count were codefendants Fabella, Morton, and Christopher Williams. Harry Haralambus was named as an unindicted co-conspirator. Williams's case was severed prior to trial. His first trial (on November 5-6, 1975) resulted in a hung jury. At the second trial January 19-22, 1976) Williams was convicted, under a superseding indictment, for possession of cocaine with intent to distribute, and conspiracy.

the codefendants and others to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §846 (count 9). He was sentenced to 5-year prison terms on each count, the sentences to run concurrently, and the sentence on count 9 to be followed by a special 5-year parole term (Sen. Tr. 21).

Morton was convicted for having distributed and possessed with intent to distribute approximately one quarter pound of cocaine, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (count 7), and for having conspired with the codefendants and others to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §846 (count 9). He was sentenced to 2 years' imprisonment on each count, to be followed by a special parole term of 5 years, the sentences to run concurrently (Sen. Tr. 32-33).[2/]

The evidence at trial established that in December 1973 appellant Fabella advised Harry Haralambus[3/] that he had access to quantities of cocaine. Haralambus then contacted

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2/ Count 1 of the indictment was dismissed on the government's motion prior to trial (App. C). Durso was acquitted by the jury on counts 4, 6, and 8; Fabella was acquitted on count 6; Morton was acquitted on count 8. (Tr. 1578-1581; App. D.) Since count 1 had been dismissed, counts 2 through 9 were referred to throughout the trial as counts 1 through 8, respectively. We have herein referred to the counts as numbered in the indictment. "App." refers to appellants' joint appendix filed herein.

3/ Haralambus, an admitted drug dealer and drug user, was the government's principal witness at trial.

his cousin, Peter Mikedes, in the Washington, D.C. area, and reported that he knew of a source for obtaining a quarter pound of cocaine (Tr. 46-56, 650). Mikedes contacted Christopher Williams, who reported that he had a buyer for the cocaine (Tr. 650-651). Mikedes informed Haralambus that a buyer was available (Tr. 651). Haralambus contacted appellant Fabella, who thereafter introduced him to appellant Durso.

Durso agreed to furnish Haralambus a quarter pound of cocaine at his cost, $3375, with Durso's one-half share of the profits (about $1700) to be received after the cocaine was distributed (Tr. 58-62; 645-649). The remaining one-half share of the profits was to be divided among Haralambus, Mikedes, Williams, and appellant Morton, all of whom agreed to use the profits to purchase more cocaine (Tr. 649).

Mikedes, appellant Morton, and one Carmen Bonita drove from Washington to Haralambus's residence in New York at the end of December 1973 (Tr. 651-653). At Morton's request, Haralambus obtained a sample of the cocaine, which they tested. Mikedes and Morton telephoned Williams to advise that they were satisfied with the quality, and to arrange for Williams to wire money to a local Western Union office in Carmen Bonita's name (Tr. 64-65, 69-71, 654-657). The following day, after Mikedes, Haralambus, and Bonita had picked up the money, Haralambus took the money to appellant Durso and obtained from him a quarter pound of cocaine (Tr. 71-75). Haralambus returned to his apartment, where the cocaine was tested and found to be

satisfactory; appellant Morton stated that it was "a salable package" (Tr. 75-77, 659-661). After reporting this to Williams, Bonita returned to Washington, D.C. by airplane, with the cocaine strapped to her body; appellant Morton returned by train (Tr. 77-80, 661-663).

After Haralambus and Mikedes had waited for a few days, Mikedes telephoned Williams, who assured him that everything was going smoothly (Tr. 663-664). A few days later, appellants Durso and Fabella came to Haralambus's residence, and Durso complained about the delay in receiving the money (Tr. 80, 664-667). Following this episode, Mikedes left his cousin's apartment to stay elsewhere (Tr. 673). He did, however, telephone Williams, telling him that Durso was upset and that they needed the money as soon as possible (Tr. 80-83, 673-75). A few days later appellant Morton arrived in New York. He told Haralambus and Mikedes that either Bonita or Williams had done "some finagling with the coke" and that as a result he had made no profit (Tr. 81, 83-84, 675).

Morton subsequently obtained some cash and sold some pharmaceutical cocaine in order to raise sufficient additional capital to purchase another quarter pound of cocaine (Tr. 81, 83-85, 91-95, 675-677).[4/] Appellant Morton gave the money to

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4/ Morton had initially indicated to Haralambus that he intended to raise sufficient capital to pay back Durso's profit on the initial purchase and also purchase another quarter pound of cocaine. There was not enough money to repay Durso's profits, however; Morton explained to Haralambus that he had had to repay another debt with some of the money he had raised (Tr. 84-85, 91-95).

Haralambus, who telephoned appellant Durso and explained that he had sufficient capital to purchase another "package" (quarter pound) of cocaine, but not enough to repay Durso's share of the profits on the first transaction. Arrangements were made for the purchase of a second package, from the sale of which Durso was to receive payment of profits on both the first and second packages (Tr. 94-96, 683-684). Haralambus subsequently delivered the money to Durso (Tr. 96). Fabella delivered the second package of cocaine, but Haralambus, Morton, and Mikedes returned it to Fabella because the quality was poor (Tr. 684).

Several days later, Mikedes received another package from Durso (Tr. 97-98, 605-686). Although dissatisfied with the quality, Haralambus, Mikedes and Morton decided to try to market it in New York (Tr. 99, 686-687). They and appellant Fabella went to the home of a women identified only as Pearl, and, though all were dissatisfied with the quality, Fabella, Morton, and Pearl agreed to do what they could (Tr. 100-101). They were unable to distribute the cocaine profitably and thus unable to repay Durso's profits.

Mikedes and Haralambus subsequently met with Durso at Fabella's apartment. Durso, angered that they did not have his money yet still retained some of the cocaine, struck Mikedes and threatened both Mikedes and Haralambus. After Mikedes left, Durso told Haralambus to "get it taken care of" (Tr. 101-103, 687-688). When he later met with Mikedes and appellant Morton, Haralambus warned that

"Mr. Durso wasn't a person to fool around with and that he meant business" (Tr. 104). They agreed to cut the cocaine and that each would try to distribute a small quantity. Mikedes returned to the Washington area with two ounces, which he sold; he transmitted the proceeds to Haralambus. Haralambus was unable to sell his share. After appellant Morton returned to Washington, Haralambus did not hear from him again (Tr. 104-107, 689).

Thereafter, Haralambus tried to avoid Durso (Tr. 106). On a couple of occasions he saw Durso, who warned him that he did not want to get violent but that he would come looking for Haralambus. Haralambus told Durso that he would try to raise the money, and did in fact repay a portion of the debt (Tr. 107, 111). Unable to raise the full amount, however, Haralambus went to live with a friend because he was afraid of Durso (Tr. 107). He repeatedly telephoned Mikedes in Washington, urging him to locate appellant Morton so that they could repay Durso (Tr. 110-111).

One or two months after these events, Durso telephoned Mikedes to ask about his money and to locate Haralambus (Tr. 689). Subsequently, in April or May 1974, Durso sent a message to Haralambus through a friend, asking him to contact Durso so that they could settle the matter and telling Haralambus not to be afraid. As a result, Haralambus contacted Durso, who offered to "front" Haralambus some more cocaine which he could then sell in order to gradually repay the debt. Haralambus agreed to this plan (Tr. 112-114).

Haralambus obtained from Durso a quarter pound of cocaine, which he tested and found to be of good quality (Tr. 114-116). He took the cocaine to Washington, D.C., in May or June 1974, and through Mikedes contacted Williams. Williams sold three ounces of the cocaine but did not pay Haralambus the full amount due. Haralambus, who had sold one ounce of the cocaine, had to return immediately to New York and could not wait for the money (Tr. 124-129). Upon returning to New York, he gave the proceeds to appellant Durso, who chided Haralambus for being $500 short, and accused him of "playing games" (Tr. 128-130). However, Durso agreed to "front" Haralambus another package of cocaine to market in Washington, D.C. (Tr. 130).

Haralambus received another quantity of cocaine from Durso, and took it to Washington, where he again contacted Williams. After testing, the cocaine was found to be inferior to the previous package, but marketable (Tr. 130-132). Williams sold the cocaine and gave Haralambus $7000-8000, which was most, but not all, of the proceeds, and which Haralambus turned over to Durso upon returning to New York. Durso assured Haralambus that he was "doing the right thing" and that he would give him "a larger package" (Tr. 133, 140-141).

Haralambus received a kilogram of cocaine from Durso, but refused it because of its poor quality. Angered, Durso demanded the money owed from the first two transactions. Haralambus telephoned Williams, who advised him to accept the cocaine because it was in short supply in the Washington

area (Tr. 141-142). In June or July 1974 Haralambus took 17 ounces (about one-half kilogram) to Washington. Williams tested it, and concluded that although it was not of good quality, it was nonetheless marketable, and gave Haralambus 45-50 pounds of marijuana in part payment for the cocaine (Tr. 143-146, 692-693). Haralambus sold the marijuana and turned over the proceeds, about $8000-9000, to Durso (Tr. 145-147). Durso told Haralambus that he would supply him with the other half kilogram package when he received the balance of the proceeds (about $8000-9000) owed on this transaction (Tr. 146-148).

Thereafter, Haralambus contacted Williams, who sent him $2000. Fearful of Durso's reaction to receiving considerably less than the amount owed, Haralambus delivered the $2000 through a friend. Durso, in turn, relayed a message to Haralambus to contact him. Haralambus telephoned Williams in an effort to obtain the rest of the money, but Williams complained that he was having problems (Tr. 150). Haralambus then went to Washington, D.C. and confronted Williams, complaining that he alone was in trouble as a result of the first transaction involving himself, Morton, Mikedes, and Williams. Williams offered numerous excuses and subsequently avoided Haralambus. Haralambus, in turn, stayed with a friend in order to avoid Durso (Tr. 150, 154-155).

On August 8, 1974, Haralambus, fearing reprisal from Durso for the now large debt owed, went to the Drug Enforcement Administration (DEA) office and reported his predicament

to Special Agent Noone (Tr. 154-157). At Noone's request Haralambus made a telephone call (recorded with his permission, Tr. 176) to Durso (Govt. Exh. 3). In this conversation Durso suggested that things could be worked out, stating: "You don't want me to be a prick and start bothering your family, or threatening your girl friend, or go after your friends. I can easily do that" (Tr. 178).

On August 12, Haralambus met at his house with Durso. According to Haralambus, Durso said he wanted the money, and that he could go after "people that were close to me, if I tried to duck him" (Tr. 183).

At the DEA office on August 21, 1974, Haralambus again telephoned Durso, and authorized the recording of the call (Tr. 186, 188; Govt. Exh. 4). In this conversation Haralambus stated that he was trying to obtain some money for Durso. Durso replied that he did not want to have to "go after" Haralambus's parents, girlfriend, and friends (Tr. 187, 193). Later the same day, Haralambus went to the Midway Bar expecting to encounter Durso. Instead, he met Fabella, who said, "You owe me the fucking money, too. . . . You owe me ($500 bucks) for six months. So far. . . "(Govt. Exh. 2; cf. Tr. 194-196). Haralambus subsequently met with Durso, who stated: I ought to take you and hang you from a tree" (Tr. 196-197). He again threatened to injure persons close to Haralambus (Tr. 198).

On September 13, 1974, while Haralambus was visiting at the residence of a friend, Durso struck him in the face, hitting

him twice more after entering (Tr. 219-221, 953-955, 1005-1006). Fabella and Durso then took Haralambus to a nearby phone booth, where Durso ordered him to "[c]all Peter [Mikedes] and tell him I have a knife to your throat and if don't get the money up here, we're going to hurt you bad or kill you." (Tr. 222-223). Haralambus made the call and delivered the message. Durso then spoke with Mikedes, telling him: "If you love your cousin, send the five up here or I'll slit his throat; then I'll come down there and take care of your asses" (Tr. 693). They then returned to the friend's residence, where Durso warned Haralambus to "get things straightened out or else things will get worse" (Tr. 224). Haralambus was taken to the hospital; one side of his face was "caved in" and he was bleeding. Occasionally he lapsed into unconsciousness. He had lost the use of one eye. Surgery was required, and he was released from the hospital about ten days later (Tr. 224-228, 956, 983-994, 1007). While in the hospital Durso telephoned Haralambus to again demand his money. He denied having struck Haralambus "that hard", suggesting that he (Haralambus) "must have fallen down a flight of stairs"(Tr. 228-229). Haralambus had no further contact with Fabella or Durso (Tr. 228).

Appellants Durso and Fabella took the stand in their own behalf. Durso denied ever having had a conversation with Haralambus about drugs (Tr. 1072-1075). He testified that he had loaned Haralambus $500 in December 1973 to help with Haralambus's

"legal problems". He further stated that Haralambus never repaid the debt despite several requests for payment (Tr. 1076-1078). Durso admitted striking Haralambus on September 13, 1974, but claimed to have done so out of anger at Haralambus's efforts to "set him up."[5/] He denied having seen or spoken with Haralambus since that day (Tr. 1079-1082).

Fabella testified that beginning in 1973 he, too, had advanced Haralambus $50-100 at a time to help him with his legal difficulties, and had asked Durso to help as well, and that by August 1974 Haralambus owed him about $500 (Tr. 1113-1115, 1124). He stated further that on August 21 he asked Haralambus to pay him the $500 (Gov't Exh. 2), but Haralambus never did so (Tr. 1151). He also testified that on September 13, while driving in his car with Durso and Haralambus, he noticed that Haralambus had been struck but he did not appear to have been hurt (Tr. 1167-1170). Fabella denied dealing in or using hard drugs (Tr. 1159-1160).

Appellant Morton did not testify, but offered the testimony of two character witnesses (Tr. 1177-1214).

5/ Durso contended that his threat to "go and bother people, go breaking into you[r] house, go bother your relative, go bother Nickie, go threaten them" was "just a fib", a lie he invented to get his money (Tr. 1107-1109).

ARGUMENT

I. 18 U.S.C. §894 PROHIBITS THE USE OF EXTORTIONATE MEANS TO COLLECT AN EXTENSION OF CREDIT ARISING FROM THE SALE OF NARCOTICS.

Appellant Durso contends (Br. at 8) that the use-of-extortionate-means statute (18 U.S.C.§894) does not reach extensions of credit which arise from deferred profits from drug sales.[6/]

Appellants Durso and Fabella were convicted for having violated 18 U.S.C. §894(a), which provides:

> Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit, or
>
> (2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both. [Emphasis supplied.]

An extension of credit is defined in 18 U.S.C. §891(1) as follows:

> To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, where the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred. [Emphasis supplied.]

Thus, the plain language of the statute reaches any extension of credit, which is defined as any debt or claim, arising in

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6/ Appellant Fabella adopts this argument (Br. at 10).

any manner, repayment or satisfaction of which is deferred.

Contrary to appellants' view (Durso Br. at 9-10), the legislative history clearly supports the broad reach evinced by the statutory language. Congress, in enacting the legislation, clearly intended that it apply to the extortionate collection of any kind of debt. In recommending enactment, the Conference Report (Conf. Rep. No. 1397, 90th Cong., 2nd Sess.) disclaimed any notion that the statute's reach was limited to loan sharking:

> The full utility of chapter 42 as a weapon in the war on organized crime obviously cannot be assessed until it has been tested in battle. Some general observations, however, appear to be in order at this point. As noted above, it is not, and is not intended to be, a Federal usury law, nor does it have anything to do with interest rates as such. It is, rather, a deliberate legislative attack on the economic foundations of organized crime. Most of the business of the underworld, whether in loan sharking, gambling, drugs, "protection," or other activities, involves extensions of credit as defined in section 891 at one or more stages. The methods used in the enforcement of such obligations are notorious. Thus, a very large proportion of underworld financial transactions fall within the ban of one or more of the provisions of chapter 42.

Conf. Rep. No. 1397, supra, at 31.

Thus contrary to appellant Durso's suggestion, Congress was not "concerned only with usurious loans" (Br. at 10) in the enactment of 18 U.S.C. 891 et seq.[7] To the contrary,

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[7] In support of this contention, appellant cites 18 U.S.C. §892(b). That section, however, merely provides that particular circumstances attending an extension of credit--i.e., repayment of the extension of credit would be unenforceable through civil judicial processes, or the (CONT'D)

Congress intended to reach the use of extortionate means to collect extension of credit and was particularly concerned with extensions of credit to facilitate other unlawful activities. See Perez v. United States, 402 U.S. 146, 155-156 (1971). Accordingly, debts arising from gambling losses have been held to be "extensions of credit", extortionate collection of which constitutes an offense under section 894. United States v. Andrino, 501 F.2d 1373, 1376-1378 (9th Cir. 1974); United States v. Keresty, 465 F.2d 36 (3rd Cir. 1972), certiorari denied, 409 U.S. 991 (1972); United States v. Broila, 465 F.2d 1018 (10th Cir. 1972), certiorari denied, 409 U.S. 1108 (1973). See also, United States v. Annerino, 495 F.2d 1159, 1164-1166 (7th Cir. 1974). There is no basis for viewing debts arising from narcotics transactions differently, and appellants suggest none. Congress expressly did not limit the statute's reach to loansharking in the traditional sense, United States v. Keresty, supra, 465 F.2d at 40-41, nor did Congress limit "its terms to a loan in the sense of money passing". United States v. Briola, supra, 465 F.2d 1021. "The absence ... of formal 'loans' and of specified interest rates ... is ... inconsequential", United States v. Andrino,

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7/ (CONT'D) extension of credit was made at a rate of interest in excess of 45 per centum annually--shall constitute prima facie evidence that the extension of credit was extortionate. These evidentiary provisions in no way restrict the applicability of section 894.

supra, 501 F.2d at 1377.

The evidence at trial established that Haralambus entered into an argument with appellants whereby he incurred an indebtedness and whereby repayment of the debt or claim was deferred. 18 U.S.C. §891(1). Pursuant to the agreement relative to the first cocaine transaction, Durso gave Haralambus one quarter pound of cocaine for $3375 , with the remaining cost--or $1700-- to be treated as deferred profits and paid after the cocaine was sold. Thus, as a consequence of this agreement, Haralambus became indebted to Durso in the amount of $1700, payment of which was deferred. When this money was not repaid, appellants commenced a portion of extortionate activity aimed at compelling Haralambus to obtain the money owed. This in turn led to further extensions of credit to Haralambus. Haralambus purchased a second package of cocaine from Durso, with the understanding that the profits from distribution would be paid to Durso. When Haralambus was unable to market this package profitably, Durso provided to him additional packages--entirely on credit--with the express understanding that the cocaine was to be sold for the purpose of raising enough money to repay the debts to Durso. When Haralambus was unable to fully satisfy the debts, appellants used even more explicit extortionate means to obtain repyament. On these facts, it is clear that extensions of credit within the meaning of section 891(1) were made and that extortionate means were used to attempt to collect such extensions of credit.

II. THE DENIAL OF DEFENDANTS' MOTION TO SEVER COUNTS WAS NOT ERROR.

Appellants contend (Durso Br. 12; Fabella Br. 4; Morton Br. 26) that the trial court erred in denying their motions to sever the narcotics counts (counts 7, 8, and 9) from the extortion counts (counts 2 through 6) (App. 11a). Under Rules 8(a), Fed. R. Crim. P., two or more offenses may be charged in separate counts of the same indictment if the offenses are of the same or related transactions, or constitute parts of a common plan or scheme. Where a joinder of offenses, although proper under Rule 8(a), is so prejudicial as to be unfair, Rule 14, Fed. R. Crim. P., provides for severance. Bayless v. United States, 381 F.2d 67 (9th Cir. 1967); United States v. Leonard, 445 F.2d 234 (D.C. Cir. 1971). The granting or denial of a motion for severance under Rule 14 is addressed to the sound discretion of the trial judge, United States v. Granello, 365 F.2d 990, 995 (2nd Cir. 1966), and is not subject to reversal except upon a showing of clear abuse of discretion. United States v. Lee, 428 F.2d 917, 920-921 (6th Cir. 1970), certiorari denied, 404 U.S. 1017(1972).

In the present case, the extortionate means counts and the narcotics counts arose from the same set of transactions, and constituted parts of a common plan or scheme. From the narcotics transactions arose a debt to the defendants Durso and Fabella, which they then attempted to collect by use of extortionate means, which in turn furthered the conspiracy to distribute narcotics. The extortionate means counts, therefore, sprung

from the initial narcotics transactions, and furthered the aims and purposes of the narcotics conspiracy. The trial court accordingly found that the offenses were "inextricably intertwined" (Tr. 1057). Thus "connected together," the offenses were properly triable at a single trial. Bayless v. United States, supra, 381 F.2d at 72. Particularly in view of the fact that trial consumed nearly two weeks, the joinder "realiz[ed] precisely the kind of economy envisaged by Rule 8(a)." Blunt v. United States, 404 F.2d 1283, 1288 (D.C. Cir. 1968), certiorari denied, 394 U.S. 909 (1969).

In evaluating the propriety of permissible joinder of counts, a crucial consideration is whether or not in a trial of one offense, evidence of the other would be admissible. United States v. Leonard, supra, 445 F.2d at 236. Evidence of other crimes is admissible to show intent, modus operandi, or the totality of the unlawful scheme. United States v. Chrzanowski, 502 F.2d 573, 575 (3rd Cir. 1974); United States v. Andrino, 501 F.2d 1373, 1379 (9th Cir. 1974). Here, evidence of the narcotics offenses would have been admissible in a separate trial on the extortionate means counts, both because it would be a natural and necessary part of the narrative, see Bayless v. United States, supra; King v. United States, 355 F.2d 700 (1st Cir. 1966); and as evidence of motive, Drew v. United States, 331 F.2d 85, 90 (D.C. Cir. 1964); Stewart v. United States, 311 F.2d 109, 112 (9th Cir. 1962).

Appellant Morton (Br. 27-28) places reliance upon this Court's decision in United States v. Miley, 513 F.2d 1191 (2nd

Cir. 1975). In Miley there had been a previous trial (resulting in a mistrial) in which the evidence showed the existence of not one, but two or possibly three separate conspiracies. This Court held that the trial court had a duty to demand a showing that the government had additional evidence by which it could establish, in the second trial, participation by all in a single conspiracy. Absent such a showing, the Court held that the joinder requirements of Rule 8(b) that the defendants allegedly participated in "the same act or transaction or in the same series of acts of transactions constituting an offense or offenses" were not met, and that severance was appropriate. Even so, the court held that no prejudice resulted from the joinder, and that the error was harmless.

Here, on the other hand, the use of extortionate means, though engaged in by only two of the defendants, constituted a series of offenses in furtherance of the conspiracy. Under the circumstances, proof of the use of extortionate means was relevant evidence as to the narcotics transaction. Thus, although not every defendant was charged with each unlawful act, joinder was proper. Wiley v. United States, 277 F.2d 820, 824 (4th Cir. 1960); United States v. Leach, 429 F.2d 956, 960 (8th Cir. 1970), certiorari denied, 402 U.S. 986 (1971); Jordan v. United States, 416 F.2d 338, 344 (9th Cir. 1969), certiorari denied, 397 U.S. 920, rehearing denied, 397 U.S. 1018 (1970).

III. THE TRIAL COURT DID NOT IMPROPERLY AMEND THE INDICTMENT AGAINST DEFENDANT MORTON.

Appellant Morton contends (Br. 29) that the trial court improperly allowed "William Morton, also known as 'Bebe'" to be substituted for "John Doe, also known as 'Bebe'", in the indictment (App. 16A). Morton makes no claim that the charges against him failed to "apprise [him] of what he must be prepared to meet" and to defend himself in the event of a future proceeding against him from a similar offense. Russell v. United States, 369 U.S. 749, 763-764 (1962). Nor does he contend that he was in any way prejudiced by the inclusion of his true name in the indictment. He argues that the identification of him as the person accused of crime allegedly was made not by the grand jury, but by the court.

Nearly a century ago the Supreme Court held in Ex Parte Bain, 121 U.S. 1 (1887), that a person cannot be tried on charges which are not contained in the indictment against him. See also, Stirone v. United States, 361 U.S. 212 (1960). Here, however, the trial court, by permitting the substitution of the intended defendant's true name for the term "John Doe, also known as 'Bebe'", performed a mere formality, constituting neither an amendment of the indictment nor a usurpation of the grand jury's function.

In effecting the substitution, the court below concluded that the defendant Morton was the same person as the "John Doe, also known as 'Bebe' Morton" before the grand jury (App. 16a). The case is thus distinguishable from Connor v. Picard, 434

F.2d 673 (1st Cir. 1970), reversed on other grounds, 404 U.S. 270 (1971), on which appellant relies. In that case the court reasoned that

> [e]ntering a defendant's name on the record could be termed a matter of form only if the grand jury had already sufficiently described him so that adding the true name was, in fact, only a formal matter.[Footnote: In Commonwealth v. Crotty, 1865, 10 Allen 403, the Massachusetts court suggested that if the document -- there a warrant -- although using a fictitious name, described the defendant's "occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified," it might be "sufficient to indicate clearly" who was intended. Id., at 405.][434 F.2d at 676].

After reviewing the minutes of the grand jury proceedings here, the Court below held that "it is clear from the testimony adduced there that Mr. Morton is the party named as John Doe in the indictment" (App. at 16a).[8/] Indeed, the fact that appellant, who does not deny that he is known as Bebe (id.), was fully identified before the grand jury as Bebe Morton, makes it clear that appellant was the party accused by the grand jury. In Connor, by contrast, the grand jury had no particular person in mind other than the person, identity unknown, who had committed the crime.

8/ In his testimony before the grand jury,Mikedes identified the defendant as "Bebe Morton" (G.J. Tr. 2-10-75 at 6). The grand jury also was aware that "Bebe" was a black male, who owned a "Blimpie's" restaurant in Washington, D.C., and who resideded in nearby Maryland about 15-20 minutes' drive by expressway from Capitol Hill (G. J. Tr. 12-16-74 at 7; G. J. Tr. 1-6-75 at 6; G. J. Tr. 2-10-75 at 6).

Since the substitution of the name "William Morton" for "John Doe, also known as 'Bebe'", constituted a change in form and not of substance, it cannot be construed as an "amendment" of the indictment, which was defined in Gaither v. United States, 413 F.2d 1061, 1071 (D.C. Cir. 1969), as follows:

> An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them.

Accordingly, the court below reasoned that the defendant was "entitled to be tried under his true name" (App. at 17a). The change was properly effected by the court and resubmission to the grand jury was not required. Russell v. United States, supra. See also, United States v. Fawcett, 115 F.2d 764, 767 (3rd Cir. 1940); United States v. Owens, 334 F. Supp. 1030 (D. Minn. 1971); United States v. Campbell, 235 F. Supp. 94 (E.D. Tenn. 1964). Cf. United States v. Cirami, 510 F.2d 69 (2nd Cir. 1975), certiorari denied, 421 U.S. 964 (1975); Dye v. Sacks, 279 F.2d 834 (6th Cir. 1960); United States v. Denny, 165 F.2d 668 (7th Cir. 1947), certiorari denied, 333 U.S. 844 (1948).

IV. THE TRIAL COURT'S REFUSAL TO CONDUCT A PRETRIAL HEARING ON THE WITNESS HARALAMBUS'S COMPETENCY TO TESTIFY WAS NOT ERROR.

There is no merit in appellant Durso's contention (Br. 17) that the government witness Haralambus's military personnel records indicating that while in the Marine Corps he had told a psychiatrist that he could hallucinate at will, obliged the trial court to hold a competency hearing before permitting the jury to hear his testimony. Rule 601, Fed. R. Evid., provides in pertinent part:

> Every person is competent to be a witness except as otherwise provided in these rules. 9/

Under the Rule, any person is competent to testify as an ordinary witness in a criminal case unless he refuses to declare that he will testify truthfully (Rule 603) or is the presiding judge or a member of the jury hearing the case (Rules 605, 606). Weinstein's Evidence, §601[01] (1975).[10/]

9/ The Rule further provides that in civil cases, the competency of a witness may in some situations be determined by applying state law.

10/ Rule 26(a) of the Federal Rules of Criminal Procedure formerly provided that ". . . the competency . . . of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Rule was amended, effective July 1, 1975, (the date on which the Federal Rules of Evidence became effective), so as to delete the above provision.

The competency of a witness to testify is a matter within the sound discretion of a trial court. United States v. Gerry, 515 F.2d 130, 137 (2nd Cir. 1975). In exercising such discretion the court is empowered to conduct a preliminary examination to determine a witness's competency, United States v. Tannuzzo, 174 F.2d 177, 181 (2nd Cir. 1949), but is not required to do so, Gurleski v. United States, 405 F.2d 253, 267 (5th Cir. 1968), certiorari denied, 395 U.S. 977, 981, rehearing denied, 396 U.S. 869 (1969); United States v. Gerry, supra.

Even under the former Rule, relatively severe mental or psychological defects were held nondisqualifying. In Robinson v. United States, 308 F.2d 327, 337 (D.C. Cir. 1962), certiorari denied, 374 U.S. 836 (1963), a mentally unstable witness, later found incompetent to stand trial, was permitted to testify. A witness who formerly had been adjudged insane was permitted to testify in Shibley v. United States, 237 F.2d 327, 334 (9th Cir. 1956), certiorari denied, 352 U.S. 875 (1956). Use of narcotics has been held to affect only the weight, not the competency, of a witness's testimony. Brown v. United States, 222 F.2d 293 (9th Cir. 1955). And in United States v. Gerry, supra, this Court sanctioned the competency of a witness who was under psychiatric care and on medication at the time of trial.

In such cases, the determination of the witness's credibility is a question for the jury. United States v. Benn, 476 F.2d 1127, 1130 (D.C. Cir. 1972). Rule 601, Fed. R. Evid.

embraces and codifies this principle by eliminating "all grounds of incompetency not specifically recognized in the succeeding rules of this Article." Advisory Committee's Note to Rule 601. There is no claim in the present case that the trial court improperly restricted the cross-examination of Haralambus; indeed, the record indicates that appellants were given broad latitude in their cross-examination of this witness. Durso concedes that the circumstances surrounding Haralambus's in-military psychiatric problems were laid before the jury, which under appropriate instructions apparently resolved the credibility issue adversely to the appellants.

V. THE GOVERNMENT PROVED A SINGLE NARCOTICS CONSPIRACY, AS CHARGED IN THE INDICTMENT.

Appellant Morton contends (Br. 20) that the proof established the existence of several narcotics conspiracies, whereas the indictment charged a single narcotics conspiracy, and that this alleged variance affected his substantial rights. The contention is without merit.

Succinctly stated, the evidence established a conspiracy in which Haralambus obtained from Durso packages of cocaine, which he, appellant Morton, Mikedes,and Williams distributed. The agreement with respect to the first transaction was to split the profits between Durso and themselves, their share of the profits to be used to make further narcotics purchases. This initial agreement was the genesis of the conspiracy, and from the unsuccessful first transaction all subsequent transactions--entered into largely for the purpose of repaying Durso's deferred profits on the first transaction--were derived. Although Durso may have been unaware of appellant Morton's identity, Morton was aware of Durso's identity as the supplier, since on at least one occasion Haralambus explicitly referred to him, warning Morton that "Mr. Durso wasn't a person to fool around with" (Tr. 104). And appellant Morton,of course, dealt with appellant Fabella,Durso's surrogate.

In any event,"each [of the co-conspirators] was aware of others in the line of distribution and of the larger nature of the operation in which he. . . played a part." United States v. Calabro, 467 F.2d 973, 982-983 (2nd Cir. 1972), certiorari denied,

410 U.S. 926 (1973). Durso, Morton, and the other co-conspirators all agreed, pursuant to their respective roles in the enterprise, to further "the common aim and ultimate purpose of the conspiracy," United States v. Sperling, 506 F.2d 1323, 1340 (2nd Cir. 1974), certiorari denied, 420 U.S. 962 (1975), which was "the placing of the forbidden commodity into the hands of the ultimate purchaser," United States v. Agueci, 310 F.2d 817, 826 (2nd Cir. 1962), certiorari denied, 372 U.S. 959 (1963).

Appellant Morton's reliance upon this Court's admonition in United States v. Sperling, supra, 506 F.2d at 1340-1341, reiterated in United States v. Miley, 513 F.2d 1191, 1210 (2nd Cir. 1975), is misplaced. In Sperling the Court observed:

> While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials.

Here, by contrast, the evidence clearly established a common agreement involving all co-conspirators, which generated a series of wholly related transactions intended to promote the drug venture. There was, as in United States v.

Bynum, 485 F.2d 490, 495 (2nd Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903 (1974), abundant evidence of a loose-knit combination to purchase and sell narcotics at a profit. United States v. Sperling, supra, 506 F.2d at 1340. Accordingly, there was no variance between indictment and proof.

VI. EXTRAJUDICIAL ADMISSIONS OF CO-CONSPIRATORS WERE PROPERLY ADMITTED IN EVIDENCE.

Appellants Fabella (Br. 8) and Morton (Br. 12) contend that the trial court erred in admitting the incriminating declarations of co-conspirators without first determining as a matter of law that a conspiracy existed.[11/] In admitting the evidence subject to connection, they contend that the trial court violated the requirements of Rule 104, Fed. R. Evid., which provides in part:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. (Emphasis supplied.)

11/ The well-settled principle that "extra-judicial statements. . . of co-conspirators occurring during a conspiracy in furtherance of it" constitute "competent evidence against their partners in crime under the ancient co-conspirators exception to the hearsay rule" [United States v. Cerone, 452 F.2d 274, 282 (7th Cir. 1971), certiorari denied, 405 U.S. 964 (1972)] is now embodied in Rule 801(d), Fed. R. Evid., which in pertinent part provides :

> (d) . . . A statement is not hearsay if . .
>
> (2) . . . The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Thus, appellants' contention is refuted by the plain language of the Rule, which--consistent with established law--permits the introduction of co-conspirators' hearsay declarations against a co-defendant, provided that independent evidence (which may be admitted subsequently) establishes the defendant's participation in the conspiracy. 12/

12/ The admission of evidence of co-conspirators' declarations subject to connection was discussed by Judge Friendly in United States v. Geaney, 417 F.2d 1116, 1120 (2nd Cir. 1969), certiorari denied, 397 U.S. 1028 (1970):

> While the practicalities of a conspiracy trial may require that hearsay be admitted "subject to connection," the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility, as could well have been the case here, declare a mistrial if the defendant asks for it. [Footnote omitted.]

It seems clear that Rule 104 on its face is wholly consistent with the existing law as described by Judge Friendly. The Advisory Committee note accompanying Rule 104(b) states in part:

> If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subsection (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support (CONT'D)

In the present case the trial judge carefully instructed the jury that it should consider the declarations of a defendant as evidence against codefendants, if and only if it determined that a conspiracy existed among the defendants and that the codefendants were members of such conspiracy (Tr. 48-51). This instruction was reiterated on numerous occasions during the course of the trial (Tr. 54-55, 73-74, 81-82, 176, 187, 193, 196-197, 220, 530, 691-692, 985). Pressed by counsel to do so (Tr. 67-68, 89-90, 123), the court made a finding (outside the jury's hearing) about halfway through the first day of trial, that by that point the Government had proved the existence of a conspiracy among the defendants. While we believe that the trial judge was not required to do so either by Rule 104 or by existing law, the court's on-the-record finding that a conspiracy involving all defendants had been established should suffice to moot appellants' present contention that the Rules of Evidence

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12/ (CONT'D) a finding of fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration [citations omitted.]

The order of proof here, as generally, is subject to the control of the judge.

required such a finding. Moreover, the denial of a motion for acquittal has been held to constitute "a preliminary determination whether, if the testimony of the government witnesses is accepted as true, each defendant's own acts and statements show a connection with the conspiracy sufficient to justify the admission of the acts and statements of co-conspirators against him." United States v. Baker, 419 F.2d 83, 88 (2nd Cir. 1969), certiorari denied, 397 U.S. 971, 976 (1970).[13/]

Appellant Morton's additional contention (Br. 16) that the court erred in allowing the jury to consider declarations of co-conspirators as evidence against him once he allegedly had withdrawn from the conspiracy, rests upon the faulty premise that Morton had in fact withdrawn from the conspiracy by the middle of March 1974. As to the

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13/ In our view, no explicit finding that independent evidence has established the existence of a conspiracy, and the defendant's participation therein, is required. Such a finding is implicit in submission of the issue to the jury,as well as the denial of a motion for judgment of acquittal. This is consistent with the requirements of Rule 104(b),which does not require an express finding that the condition subsequently has been fulfilled,but merely that the evidence be sufficient to support such a finding.

preliminary question of admissibility the court found that Morton was and remained a member of the conspiracy at the time such declarations were made (Tr. 122), and that the question of withdrawal ultimately was one of fact for the jury (Tr. 122, 931-932). Since the record was devoid of evidence that Morton had taken an affirmative act of withdrawl [see Hyde v. United States, 225 U.S. 347, 369 (1912)], the court's ruling was correct.[14/]

14/ Once appellant's involvement in the conspiracy had been proved by competent evidence, the burden was on him to show that he had withdrawn. United States v. Borelli, 336 F.2d 376, 388 (2nd Cir. 1964), certiorari denied, 379 U.S. 960 (1965).

VII. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN APPELLANT FABELLA'S CONVICTION ON COUNTS 5 AND 9 OF THE INDICTMENT.

Appellant Fabella was charged with conspiracy to distribute and possess with intent to distribute, quantities of cocaine (count 9), use of extortionate means to collect an extension of credit, on September 13, 1974 (count 5), and conspiracy to use extortionate means (count 6). The jury convicted him of the first two of these offenses, and acquitted on count 6. Fabella contends (Br. 6) that the evidence adduced at trial was insufficient to sustain the judgments of conviction on counts 5 and 9.[15/] These contentions are refuted by the record.

1. As we have shown, the government proved not only the existence of an ongoing conspiracy to distribute cocaine, but also several overt acts in furtherance thereof. Contrary to appellant's contention, there was abundant evidence of his participation in the conspiracy. Fabella was himself largely responsible for the formation of the conspiracy. In December 1973, he contacted Haralambus and advised him that

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15/ Fabella has referred to these as counts 4 and 8, respectively. See note 2, infra.

he had access to quantities of cocaine. Subsequently, he introduced him to the supplier, Leonard Durso.[16/] Fabella also supplied Haralambus with a sample of the cocaine (Tr. 53-54). When the money from the first transaction was not promptly delivered, Fabella accompanied Durso to Haralambus's residence and was present when Durso complained about the delay. Having been instrumental in the formation of the conspiracy and arrangements for the first drug transaction, Fabella acted as a courier in the second sale of cocaine. Haralambus and Mikedes obtained the cocaine at Fabella's home. When it was found to be of bad quality, they returned it to Fabella. When a substitute quarter-pound of cocaine was obtained from Durso, Fabello assisted the others in attempting to distribute it. When they were unable to sell the cocaine profitably, Haralambus and Mikedes met with Durso and Fabella at the latter's apartment. At this time, Durso threatened Haralambus and Mikedes.

Fabella's participation in the narcotics conspiracy was further evidenced by the use,with Durso, of extortionate means to collect the debts incurred by Haralambus in connection with the narcotics sales. (This is discussed more fully below.)

16/ Contrary to appellant's suggestion (Br. at 6-7), the fact that Haralambus did not so testify before the grand jury is of no relevance to a consideration of the question of sufficiency on appeal. This may have affected the witness's credibility, a matter within the exclusive province of the jury.

Moreover, once the government proved Fabella's participation in the conspiracy, the acts of co-conspirators in furtherance of the unlawful confederation were chargeable to appellant. Pinkerton v. United States, 328 U.S. 640, 645-647 (1946). In sum, the evidence of appellant Fabella's participation in the conspiracy was ample, and the jury was clearly entitled to conclude that he had knowingly and wilfully participated in the conspiracy to distribute cocaine as charged.

2. Fabella's role in the September 13, 1974 use of extortionate means to collect money owed by Haralambus was also proved at trial. "Extortionate means", as used in 18 U.S.C. §894, is defined in 18 U.S.C. §891(7), as follows:

> An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

To succeed in a prosecution under 18 U.S.C. §894, therefore, the government must prove the existence of an extension of credit (see infra, pp. 14-17) and that the defendant expressly or impliedly used or threatened to use violence or other criminal means in order to collect the debt. United States v. De Stafano, 429 F.2d 344 (2nd Cir. 1970), certiorari denied, 402 U.S. 972 (1971); United States v. Biancofiori, 422 F.2d 584 (7th Cir. 1970), certiorari denied, 398 U.S. 942 (1970).

Here, the evidence showed that on September 13, 1974 Fabella and Durso went first to Haralambus's residence. then (after finding him not at home) to the house of a friend with whom Haralambus was staying in order to avoid Durso. There, Durso struck Haralamabus with such force that surgery and nine or ten days' hospitalization were required. Fabella's knowledge of the circumstances from which the debt arose and of Durso's propensity to use violence, negated any possibility that he innocently accompanied Durso. Fabella clearly was not a mere bystander to these events, as was indicated by his conversation with Haralambus three weeks earlier,on August 21. In that conversation Fabella warned that repayment of the debt was long overdue,and told Haralambus; "You owe me the fucking money, too" (Govt. Exh. 2). Fabella had also been present several months earlier when Durso, after demanding money, had punched Peter Mikedes in the face, breaking his glasses and bloodying his lip (Tr. 688). From these circumstances, the jury was clearly entitled to infer that appellant Fabella had, in concert with Durso, knowingly and intentionally used extortionate means to attempt to collect a debt owed to Durso and himself.

Even if the jury had concluded that initially Fabella had accompanied Durso innocently, once Durso had seriously injured Haralambus, the fact that Fabella accompanied Haralambus and remained present while Durso forced him to make a threatening telephone call to Mikedes, is wholly inconsistent with the claim that his conduct was innocent.

By aiding and abetting Durso's actions in using extortionate means and punishing Haralambus, Fabella was punishable as a principal. United States v. Ramsey, 374 F.2d 192, 196 (2nd Cir. 1967); United States v. Gower, 447 F.2d 187, 193 (5th Cir. Cir. 1971), certiorari denied, 404 U.S. 850 (1971); United States v. Leeper, 413 F.2d 123, 127 (8th Cir. 1969).

VIII. THE EXTORTIONATE MEANS COUNTS WERE NOT MULTIPLICTOUS

Appellant Durso's contention (Br.14) that counts 2, 3, and 5[17] (charging the use of extortionate means to collect an extension of credit on August 8, August 11, and September 13, 1974, respectively) stated but a single offense, is unavailing. The conduct which 18 U.S.C. §894 proscribes is the use of extortionate means. Here, the government proved that Durso had employed extortionate means on three separate occasions.

Haralambus testified that in a telephone call on or about August 8, 1974, Durso said: "You don't want me to be a prick and start bothering your family, or threatening your girl friend, or go after your friends. I could easily do that if I want to." This threat was sufficient to place Haralambus in fear of harm to himself or those close to him (Tr. 178-179). On or about August 1, 1974, Durso met Haralambus at the latter's home, where he stated that "he wanted the money, and that. . . he could go after people that were close to [Haralambus] if [he] tried to duck him" and that if Haralambus disappeared, "he would get to me somehow, and do harm to me" (Tr. 183). On September 13, 1974, Durso appeared at a friend's

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17/ The jury acquitted Durso on count 4, which charged the use of extortionate means to attempt to collect an extension of credit on August 21 (Tr. 1580).

apartment, struck Haralambus two or three times on the face (Tr. 220-221, 995, 1005-1006, 1079), causing him serious injury requiring surgery and hospitalization for nine or ten days (Tr. 224-228, 956, 983-994, 1007, 1170). Accompanied by Fabella, Durso took Haralambus to a telephone booth, and ordered him to call his cousin, Mikedes, in Washington, and to tell him that Durso had a knife to his throat and that unless Mikedes sent money, "we're going to hurt ([Haralambus] bad or kill [him]" (Tr. 222-224, 375, 693).

Here, each count charged the use of extortion at different times and by different means. Cf. United States v. Crummer, 151 F.2d 958 (10th Cir. 1945), certiorari denied, 327 U.S. 785 (1946). That the same underlying indebtedness was the motive for each of the unlawful acts did not cause the acts to merge into a single offense. United States v. Biancofiori, 422 F.2d 584 (7th Cir. 1970), certiorari denied, 388 U.S. 942 (1970). Accordingly, these distinct instances of criminal conduct were properly alleged as separate offenses in the indictment.[18/]

18/ In any event, since Durso was sentenced to concurrent prison terms as to each count, the Court need not reach this question. Barnes v. United States, 412 U.S. 837, 848 n. 16 (1973).

IX. THE UNRESPONSIVE TESTIMONY OF A GOVERNMENT WITNESS THAT DEFENDANT DURSO HAD "MADE A SEXUAL ADVANCE" TOWARD HIM, DID NOT WARRANT THE GRANTING OF A MISTRIAL.

Appellant Durso contends (Br.19) that the trial court should have granted his motion for a mistrial on account of the following exchange, which occurred during the direct examination of Peter Mikedes, a government witness:

> Q [by Special Attorney Katz]. Did you give him [Durso] any money?
>
> A. No. During that afternoon --as I said, he had been drinking and he made a sexual advance toward me.
>
> MR. WALES [counsel for Durso]: Your Honor, I am going to object to this.
>
> THE COURT: Strike it out.
>
> MR. WALES: I have an application, Your Honor.
>
> THE COURT: The jury may be excused. [Tr. 667.]

The trial court denied appellant's motion for a mistrial (Tr. 672).

It is clear that Mikedes' remark had no relevance to the instant case, and that it was uncomplimentary to Durso. It is equally clear that the unresponsive remark was not solicited, directly or indirectly, by the government, and that the trial court acted immediately to order the remark stricken. In the circumstances, reversal of Durso's conviction is not warranted by the fleeting suggestion of homosexuality.

Whether prejudicial error warranting reversal has been

committed must be determined upon the basis of the record as a whole. The Supreme Court in Kotteakos v. United States, 328 U.S. 750, 764-765 (1946), stated:

> The crucial thing is the impact of the thing done wrong . . . on the minds of other men, not on one's own, in the total setting. . . .
>
> * * * *
>
> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm [footnote omitted] or a specific command of Congress.

Here, the remark was a passing comment in a massive narrative recorded in the 1800-page record of the trial. In relation to the myriad of facts attested to at the trial, this one supererogation should not be accorded undue significance.

Moreover, the determination of the trial judge as to the impact, if any, upon the jury is entitled to great weight. As the court stated in Atkinson v. United States, 344 F.2d 97, 101(8th Cir. 1965), certiorari denied, 382 U.S. 867 (1965):

> The trial court had an opportunity to observe the jury and the impact of the testimony upon it. The trial court's appraisal of the effect is entitled to considerable weight. The trial court acted promptly and sustained the objection and advised the jury to disregard the testimony.

Accordingly, the Atkinson court declined to reverse a conviction on account of a prejudicial reference to a defendant's

prior incarceration. Accord: McBride v. United States, 409 F.2d 1046, 1048 (10th Cir. 1969), certiorari dismissed, 396 U.S. 938 (1969).

Under these circumstances, the drastic remedy of aborting a long trial which was well under way was not warranted. See United States v. Stromberg, 268 F.2d 256, 269 (2nd Cir. 1959), certiorari denied, 361 U.S. 863 (1959), where this Court observed in a related context:

> There can be no doubt that the testimony . . . was inadmissible. . . and prejudicial. However, the answer was unforseeable; plainly it had not been induced by the prosecution. The judge immediately struck out the testimony and instructed the jury to disregard it . . . . And the incident was an isolated one during the course of a long trial.

X. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING MORTON.

Appellant Morton claims that "by adopting a mechanical policy of deliberately refusing to consider the possibility of imposing a sentence of probation in narcotics cases," the court below illegally sentenced him. The contention is without merit.

Appellant points out that the imposition of sentence, a matter within the sound discretion of the trial court, is nonetheless subject under limited circumstances to a severely circumscribed appellate review. We submit, however, that the record makes apparent that Judge Mishler fairly and deliberately exercised his discretion in pronouncing sentence upon the appellant.

After hearing the statement of the defendant and the argument of counsel, the court, prior to imposing sentence, stated:

> I think a great deal of what you say I agree with. I think there is something very attractive about the defendant. He has a very stable and supportive family
>
> I have read all the record, but this is a serious offense. He did deal in cocaine and the jury found that he dealt with cocaine, and I don't think that anyone that makes a business of dealing in cocaine for however brief a time is entitled to probation.
>
> [Sentence was imposed.]
>
> I might say that both my conferring Judges would have given a stiffer term than I handed out on all of these defendants, and I don't know whether it is because I am getting soft or whether it is because I heard the

case and probably know it better than they do, but one would have imposed a sentence of seven years plus eight years special parole, the other six years and five years special parole term.

MR. WEINGARD: In connection with my client?

THE COURT: Yes, they recognize that this defendant played a lesser role than the other two, and of course he was free of any suggestion of violence. There is no suggestion of violence in his background.

I think, as I say, he presents a very stable background and I think he has a wife who fully understands him. He is very fortunate to have that [Sen. Tr. 32-33.]

Far from manifesting "a mechanical policy" or inflexible practice with respect to sentencing, we submit that Judge Mishler, who presided at the trial and heard all the evidence, carefully tailored the sentence to the defendant, giving heed to the seriousness of the offense, the involvement of the defendant, and the defendant's background. See Williams v. New York, 337 U.S. 241 (1949).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF FOR APPELLEE was served upon the appellants by mailing copies thereof to their respective counsel, at the addresses listed below, on January 28, 1976.

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